APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12987

VAN CURLER BROADCASTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

HUDSON VALLEY BROADCASTING COMPANY, INC., INTERVENOR

No. 12989

GREYLOCK BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

HUDSON VALLEY BROADCASTING COMPANY, INC., INTERVENOR

On Petitions for Review of Order of the Federal Communications Commission

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Decided July 9, 1956

Mr. Harry M. Plotkin, with whom *Mr. Paul A. Porter* was on the brief, for petitioner in No. 12987. *Messrs. L. Reed Miller* and *George Bunn* also entered appearances for petitioner in No. 12987.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.,* was on the brief, for petitioner in No. 12989.

Mr. Daniel R. Ohlbaum, Counsel, Federal Communications Commission, with whom *Mr. Stanley N. Barnes,* As-

sistant Attorney General, *Messrs. Daniel M. Friedman* and *William J. Lamont,* Attorneys, Department of Justice, *Mr. Warren E. Baker,* General Counsel, Federal Communications Commission, and *Mr. Richard A. Solomon,* Assistant General Counsel, Federal Communications Commission, were on the brief, for respondents.

Mr. D. M. Patrick, with whom *Mr. Stanley S. Harris* was on the brief, for intervenor.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, sitting *en banc.*

PRETTYMAN, *Circuit Judge:* This matter is closely akin to the cases known here as the *Coastal Bend* cases,[1] decided June 7, 1956. The factual background recited in the opinion in those cases need not be repeated here. There is a difference. In those cases the petitioners-appellants were UHF licensees complaining of pending grants of VHF licenses in their areas. In the present cases the petitioners, also UHF licensees, are complaining of the allocation of a VHF channel (Channel 10) to a community in their area. The *Coastal Bend* cases concerned licenses; the present cases concern a channel assignment.

Upon a preliminary consideration of Greylock's motion to that effect we stayed the Commission's order so as to preserve, in view of the patently impending damage, the existing status of affairs until the controversy could be briefed and argued and considered by us in due course.[2]

Petitioner Greylock owns and operates a UHF television station at North Adams, Massachusetts, with its transmitter on Mount Greylock in Massachusetts, to the

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[1] — U.S. App. D.C. —, 234 F.2d 686.

[2] See opinion on Intervenor's Motion to Reconsider and Vacate Stay, Greylock Broadcasting Co. v. United States and Federal Communications Comm'n, — U.S. App. D.C. —, 231 F.2d 748 (1956). [This opinion is Appendix B to this petition]

east of the Albany-Troy-Schenectady area. Petitioner Van Curler owns a UHF license for operation in Albany but was not operating at the time of the proceedings in this court. Intervenor Hudson Valley owns and operates a UHF station in Albany. It petitioned the Commission to amend its Table of Assignments of television channels so as to assign Channel 10 to a small community, Vail Mills, northwest of Schenectady. The requested assignment met the Commission's engineering requirements as to distances, etc.[3] After prolonged rule-making proceedings the Commission issued the order here under review, granting the allocation.

The Sixth Report of the Commission,[4] which is the presently outstanding basis for the allocation of television channels, was an amendment, pursuant to a rule-making proceeding, of Section 3.606 of the Commission's Rules and Regulations. It provided a Table of Assignments,[5] specifying channels and their community locations, and contained a long explanation of the principles governing the Assignment Table[6] and explanatory provisions in respect to changes in the Table.[7] The Commission specifically called attention to the fact that possible assignments on Channels 2-65 had not been made in the Table,[8] announced that it would follow its assignment spacing requirements in future proceedings dealing with amendments to the Table, and made clear that persons wishing to apply for a channel not specified in the Table would be required to secure an amendment to the Table

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[3] Sec. 3.610, 47 C.F.R. § 3.610, 1 PIKE & FISCHER RADIO REG. 53:616.

[4] Adopted April 11, 1952, 1 PIKE & FISCHER RADIO REG. 91:599 *et seq.*

[5] Report §§ 248-982.

[6] Report §§ 63-200.

[7] Report §§ 201-214.

[8] Report § 29.

through appropriate rule-making proceedings before submitting an application for a license.[9] Thus the Sixth Report contemplated and provided for not only a present Table of Assignments but also future amendments to that Table by the assignment of additional channels to communities under specified rules and policies.

The procedure outlined in the Sixth Report was followed in the present matter. An application for a rule-making proceeding to amend the Table of Assignments by the additional assignment of Channel 10 to Vail Mills was made, the procedure prescribed by the Administrative Procedure Act for rule-making was followed, and the Table of Assignments was amended by the order here under review.

In its report and order the Commission recited that the proposed assignment was consistent with its rules and the principles of its present television allocations, and that it would not be justified in withholding action which would bring additional service to a significant number of people. It said Channel 10 at Vail Mills would represent a second service to an appreciable percentage of the families in the area and a first service to a significant number of families. Since this was a rule-making and not an adjudicatory proceeding, the Commission was required to make merely "a concise general statement of their [*i.e.*, the rules'] basis and purpose."[10]

The grant of a license on the newly assigned channel is not before us, no application for a license having even been filed as yet, so far as this record shows. The matter before us is solely a rule-making.

Since the Commission did not summarily depart from established principles or program, but on the contrary

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[9] Report § 201.

[10] Sec. 4(b), Administrative Procedure Act, 60 STAT. 238 (1946), 5 U.S.C.A. § 1003(b).

followed a course clearly anticipated and provided for in its basic Sixth Report, its action can in no sense be deemed arbitrary or capricious. Since all procedural requirements as to rule-making proceedings were met, no defect in the order appears in that respect. The conclusion reached by the Commission is clearly stated. The basis and purpose of the order are ample and understandably, even though succinctly, stated and are within the considerations prescribed by the statute as criteria for Commission action.[11] The order is also consistent with the provisions of the act dealing with the distribution of licenses.[12] The given reasons are rational and support the conclusion. Having reached the foregoing conclusions the function of the court is at an end in a case such as this.

Petitioners urge that the action of the Commission is invalid because during the course of this proceeding the Commission received and listened to, *ex parte*, representatives of the Columbia Broadcasting System. But it appears that these calls and conversations were in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceeding to deal with intermixture. We find nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record.

Affirmed.

BAZELON, *Circuit Judge*, dissenting: In denying intervenor's motion to reconsider and vacate the stay we had granted herein, we pointed out the potential public injury which could result from authorizing the Channel 10 "drop-in" before the determination of the deintermixture

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[11] 48 STAT. 1082 (1934), as amended, 47 U.S.C.A. § 303(g) and (r).

[12] 48 STAT. 1083 (1934), as amended, 47 U.S.C.A. § 307(b).

proceeding.[1] We said: "Greylock urges, and we agree, that every interest of fair distribution will be served by postponing the allocation until the Commission decides, in the proceeding already under way, whether there is to be such an allocation to this area."[2] And we concluded:

"We find specifically that the present allocation of Channel 10 to the Vail Mills area pending the outcome of the deintermixture proceeding would impose upon Greylock losses which it could not recover, and that this threat of loss is not offset by any vantage to the public interest."[3]

I know of no changed circumstance which impels abandonment of that conclusion.

In *Coastal Bend* we held that, whatever might be the probability that the 1952 station allocations would be deintermixed by the Commission in the current rule-making proceedings, "we clearly should not compel the Commission to delay existing adjudicatory proceedings conducted in accordance with the statute and valid regulations thereunder in order to await the outcome of rule-making pro-

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[1] "No public interest is served by an immediate allocation. Under present allocations the area is predominently—seven to one—UHF. Only one VHF station is operating, and some of the national networks in their competition with one another must use one of the two UHF stations now in operation. The public has bought and is buying its receiving sets in the light of those facts. If the Commission finally decides to leave the area as it is now, the public will buy, or retain, its sets in light of that fact. If the Commission decides to allocate permanently another VHF channel, it seems to be agreed that the UHF stations will fold. The public will thereafter be governed by that circumstance. If a VHF allocation is made temporarily, pending consideration of its permanency, complete public uncertainty is created; both owners and buyers of sets would be thrown into a whirlpool of sales pressures, possibly to no permanent purpose. We see no public benefit in such a completely uncertain temporary arrangement." Greylock Broadcasting Co. v. United States, — U.S. App. D.C. —, —, 231 F.2d 748, 750 (1956).

[2] *Ibid.*

[3] — U.S. App. D.C. at —, 231 F.2d at 751.

ceedings.'"[4] We said that "an adjudication that conforms to the 1952 allocation is valid" and that the public interest factors being urged against the adjudication had necessarily been determined by the Commission in designing the allocation.[5]

The case now before us is significantly different from *Coastal Bend.* The issue it presents is not whether we should prevent the Commission from adhering to the 1952 allocation table pending the outcome of the general deintermixture proceeding; it is rather whether we should permit the Commission to make *ad hoc* departures from its allocation table in a manner which pre-judges issues pending for determination in the general deintermixture proceeding. Whereas the public interest factors urged by the *Coastal Bend* petitioners had been determined against them in the adoption of the allocations, those now urged by these petitioners have never been heard or judged, but are now being determined (in practical effect) by way of a departure from the allocations.[6]

This predetermination of petitioners' case violates the spirit of *Ashbacker Radio Co.* v. *Federal Communications*

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[4] — U.S. App. D.C. —, 234 F.2d 686 (Nos. 13034 et al., decided June 7, 1956), slip opinion, p. 9.

[5] *Ibid.*

[6] Since the argument of this case, the Commission has considered these public interest factors and has promulgated a Report and Order (Docket No. 11532, June 26, 1956) concluding, at least tentatively, that these factors favor the position here asserted by petitioners. The Commission also issued a Notice of Proposed Rulemaking (Docket No. 17751, June 26, 1956), proposing, in implementation of the aforesaid Report and Order, to delete Channel 10 from Vail Mills. Following the promulgation of these documents, petitioner Van Curler moved for leave to add them to the record herein and to file additional briefs and make further argument based upon what it considered to be the Commission's change of position. The Court has denied that motion, apparently upon the ground that the Commission's tentative determination that the allocation of Channel 10 to Vail Mills is against the public interest is of no weight in the court's determination of whether that allocation should be sustained. From that action I dissent.

Commission, 326 U.S. 327 (1945). That the proceeding referred to in that case was adjudicatory while this one is rule-making does not alter the case. The Commission necessarily makes some of its determinations in rule-making rather than adjudicatory proceedings. We have specifically upheld its power to determine channel allocations by rule-making. *Peoples Broadcasting Co.* v. *United States,* 93 U.S. App. D.C. 78, 209 F.2d 286 (1955); and *Logansport Broadcasting Corp.* v. *United States,* 93 U.S. App. D.C. 342, 210 F.2d 24 (1954). In so doing, we said that such a rule-making proceeding was not to be treated as an adjudicatory proceeding "merely because the rule adopted may be determinative of specific situations arising in the future." *Logansport Broadcasting Corp.* v. *United States,* 93 U.S. App. D.C. at 345, 210 F.2d at 27. A hall-mark of rule-making, we pointed out, was "future rather than a present or past effect." *Ibid.* It would be most inaccurate to say the action here complained of "merely . . . may be determinative" of a specific situation. It is avowedly directed at one specific situation. Nor can it be said that the effect of the action is only future, for it will inevitably have a present impact. The conflict between petitioners and intervenor here is whether the Albany-Troy-Schenectady area should become all-UHF, as petitioners desire, or more-VHF than it is, as intervenor desires. The Commission's action here complained of makes the area more-VHF. The networks' contracts to supply programs to the stations in the area will immediately be affected by the knowledge that there is to be a second VHF station. Furthermore, since a second VHF is likely to destroy the existing UHF stations, viewers, in buying their sets will "be governed by that circumstance."[7] *Ashbacker* holds that, where there are conflicting proposals, it is unfair to grant one and then impose upon the other the burden of justifying its displacement. That rule, in my judgment, is applic-

[7] *Supra* note 1.

able to the proceeding in this case, whether it be called rule-making or adjudicatory, for *Ashbacker* will not tolerate procedure which "may satisfy the strict letter of the law but certainly not its spirit or intent." 326 U.S. at 331. "Legal theory is one thing. But the practicalities are different." *Id.* at 332.

If the majority means to suggest that the Channel 10 "drop-in" was not a departure from, but rather an implementation of the table of allocations, I cannot agree. The provision in the Sixth Report and Order for amendment of allocations provides no particular support for such a suggestion. Any administrative policy may be changed, whether or not there is a specific provision to that effect. Articulating the possibility of amendment does not support a theory that amendment is adherence rather than departure.

EDGERTON, *Chief Judge,* concurs in this dissent except with respect to petitioner's motion to supplement the record, and for leave to file additional briefs and make further argument.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12989

GREYLOCK BROADCASTING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

HUDSON VALLEY BROADCASTING COMPANY, INC., INTERVENOR

On Motion to Reconsider and Vacate Stay

Filed February 14, 1956

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* On December 9, 1955, this court stayed that part of an order of the Federal Communications Commission which would have allocated television Channel 10 to Vail Mills, New York. The intervening broadcaster (Hudson Valley Broadcasting Company, Inc. now moves that we reconsider and vacate the stay. Its ground for so moving is that the action of the court was under Section 9(b) of the Judicial Review Act, 64 STAT. 1131 (1950), 5 U.S.C. § 1039(b); that that section requires as a premise for a stay a specific finding that irreparable damage would otherwise result to the petitioner (*i.e.*, Greylock Broadcasting Company); that this court made no such finding; and that no such finding is possible upon the evidence of record.

The controversy revolves about the UHF-VHF television problem presently before the Commission. UHF

broadcasters have experienced grave difficulties of an economic sort due to the wide ownership by the public of VHF receiving sets and the costs of either converting or of adding UHF receivers. Thus, where both types of transmission are in use in an area, the network services and the consequent greater proportion of the remunerative commercial contracts have been going to the VHF stations. The situation has developed to such a point that the Commission instituted a rule-making proceeding, nationwide in scope, to consider, among other alternatives, the desirability of the "deintermixture" of the two services. The broad meaning of the deintermixture proposal is the desirability of so redistributing allocations as to eliminate or lessen the competition between the two types of service in specified areas. That proceeding is now pending before the Commission, and the stay here involved does not impede or interfere with its progress in any manner whatsoever.

The area involved here is the Albany-Schenectady-Troy area in New York. Presently, under the Sixth Report of the Commission, seven UHF and one VHF commercial television channels are allocated to the area. Our intervenor, Hudson Valley, is now the owner of a UHF license. It calculated that under the Commission's engineering regulations as to spaces, distances, etc., another VHF allocation (Channel 10) could be made to the area if the station were located at Vail Mills, a small community about twenty miles northwest of Schenectady. It made a proposal to that effect to the Commission. At about the same time proposals and counter-proposals for the deintermixture of the area were made.

The Commission, by a four-to-three vote, granted the allocation of Channel 10 to Vail Mills but put the deintermixture problem of the area into the nationwide rulemaking proceeding. Greylock and the Van Curler Broadcasting Corporation, both UHF operators in the

area, protested and then appealed. We stayed the allocation of Channel 10 pending disposition of Greylock's petition for review.

The Sixth Report and Order of the Commission, adopted April 11, 1952, was the final report in proceedings instituted in 1948. It established a nationwide table of assignments for television frequencies and made separate "final assignments" of channels to the various communities in the country. The allocation of Channel 10 (VHF) to this area is not in the Sixth Report or in any allocation heretofore made. It is a new allocation, a "drop-in", permissible under engineering limitations but not heretofore allowed. Greylock avers, with proffer of proof, that if this second VHF station goes into operation in the area, under the auspices and with the contracts presently available for such a station, it (Greylock) will be forced off the air. Its averment is borne out by the common experience of others. As we understand it, no one disputes the dire effects upon UHF operations of competing VHF services in the present state of the art.

The mere allocation of the channel to the area is not, of course, the award of a license; it is indeed a long way from that conclusion. But it is a first step. The new allocation poses in practical and realistic form a threat to the continuance of the UHF stations. If the channel remains thus allocated a license on it will surely be awarded to somebody sometime. It is quite clear that, if the new allocation of a VHF station is made temporarily, all of Greylock's plans, programs and commitments, both for revenue and for expenditure, must be upon a conditional basis; its future is undetermined. Immediately the new allocation is made and the new station becomes a close possibility, Greylock's operation takes on a conditional character. Obviously operation upon such a basis causes losses in comparison to operation absent such pending contingencies; and that such losses cannot

be recouped is also obvious. It is clear from the material offered by Greylock that if a license is open for award upon the new channel it (Greylock) will either have to acquire that license (by award or by purchase) or be driven off the air. Of course the mere pendency of the proposed allocation poses some part of the threat to Greylock, but the accomplishment of the allocation, making the presence of the available channel an accomplished fact, greatly magnifies those incipient losses.

It is noteworthy that on the same day it granted the Vail Mills "drop-in" the Commission denied all other requests for changes in the present table of assignments pending the rule-making deintermixture determination.

Hudson Valley and the Commission say that Greylock's choice in the presence of the allocation is merely a matter of business judgment. But this sort of gun-to-the-head choice is not what is customarily known as the exercise of business judgment.

A question presented by Greylock's petition for review is whether it (Greylock) was entitled to a hearing before finalization of the allocation of Channel 10 to this area; that is, whether under presently known facts an operating UHF station is entitled to a hearing before the allocation of a new VHF channel. As presented the question involves due process considerations. The question posed is a substantial one. We intimate no view whatever upon the matter. Our present concern is merely that the question is substantial. The making of the allocation now, while the question whether it is ultimately to remain is under formal consideration by the Commission, serves no useful purpose, so far as we can ascertain from the material before us. The Commission says it will now allocate the channel to the area and hereafter decide whether to leave it there. Greylock urges, and we agree, that every interest of fair distribution will be served by postponing the allocation until the Commission decides, in the pro-

ceeding already under way, whether there is to be such an allocation to this area.

No public interest is served by an immediate allocation. Under present allocations the area is predominently—seven to one—UHF. Only one VHF station is operating, and some of the national networks in their competition with one another must use one of the two UHF stations now in operation. The public has bought and is buying its receiving sets in the light of those facts. If the Commission finally decides to leave the area as it is now, the public will buy, or retain, its sets in light of that fact. If the Commission decides to allocate permanently another VHF channel, it seems to be agreed that the UHF stations will fold. The public will thereafter be governed by that circumstance. If a VHF allocation is made temporarily, pending consideration of its permanency, complete public uncertainty is created; both owners and buyers of sets would be thrown into a whirlpool of sales pressures, possibly to no permanent purpose. We see no public benefit in such a completely uncertain temporary arrangement.

Our dissenting brother says the public interest criterion should control in this matter. But the public interest in the UHF-VHF problem is the precise question which is to be answered by the Commission in the deintermixture proceeding. If UHF stations are not in the public interest they could not be authorized at all. If this court were to declare now that a new VHF station, which would eliminate UHF stations presently in an area, is in the public interest, that declaration would conclude the whole controversy now being so exhaustively explored by the Commission. We cannot do that on the evidence before us; indeed it is not our function to declare initially what is in the ultimate public interest. Our function goes to the preservation of an existing situation *pendente lite* where irreparable damage would ensue from an immediate and possibly temporary change.

Our dissenting brother also says the public wants VHF reception. But we do not know that to be so. The wide use of VHF sets may be due to the fact that VHF was available earlier, gave good service, and saturated the market before UHF came. The present wide ownership of VHF sets is not necessarily an indication that UHF is not better physical service and will not be preferred by the public when, as and if programs over it are comparable with VHF programs and VHF sets wear out. Progress and change are frequently in the public interest. The Commission, as we understand it, has that problem, among others, before it in the pending rule-making (deintermixture) proceeding.

We find specifically that the present allocation of Channel 10 to the Vail Mills area pending the outcome of the deintermixture proceeding would impose upon Greylock losses which it could not recover, and that this threat of loss is not offset by any vantage to the public interest.

The motion to reconsider and vacate our stay order will be denied.

DANAHER, *Circuit Judge, dissenting:* Pursuant to a proposal filed by Hudson Valley Broadcasting Company, Inc., found to comport with the Commission's present television allocation plan and rules, the Commission assigned VHF Channel 10 to Vail Mills, New York. The stay which the majority grants would have the effect not merely of precluding the Commission from accepting, processing and holding any hearing on applications for that channel until the present action shall have been finally determined. It would do more. The majority intends it to do more. As a practical fact, the majority would stay the Commission's hand "pending the outcome of the deintermixture proceeding." Under the circumstances of this case, such interference with the performance by the Commission of the duties entrusted to it does such violence to my understanding that I am bound to dissent.

The differences between my colleagues and me involve issues of policy in the division of authority as between the Commission and the court. It seems to me established that the public interest criterion should control. "Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. . . . Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes."[1] Again the Court told us: "It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. . . . Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[2]

Such thinking should govern the instant case. Here, the Commission out of its own expertise found that the public interest required that additional VHF television broadcasting on available Channel 10 be brought to the affected area at the earliest possible moment. The Commission says: "Refusing to make use of this valuable VHF frequency as contemplated by the present rules would, we believe, be a waste of valuable spectrum space for which active demand is indicated. Channel 10 in Vail Mills will represent a second television service to an appreciable percentage of families residing in the area, as well as a first service to a significant number of families." Surely the Commission is authorized to make such a finding and to interpret the Act so as to achieve its purposes.[3]

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[1] Scripps-Howard Radio v. Comm'n., 316 U.S. 4, 15 (1942).

[2] Federal Comm'n v. Broadcasting Co., 309 U.S. 134, 146 (1940).

[3] § 301; § 303 (b), (d), (g), (h) and (r), among others; § 403. "The Supreme Court has admonished us many times to give 'great weight' to an agency's interpretation of its governing stat-

It is correct, as the majority say, that "Greylock and the Van Curler Broadcasting Corporation,[4] both UHF operators in the area, protested[5] and then appealed." Greylock, a UHF station, says it will be "irreparably injured" if the public is given what it wants, namely VHF television broadcasting.

Greylock's president and principal stockholder, in his affidavit supporting its motion for an immediate stay, tells us that "Operation on Channel 10 is at least a year away." But the Commission's rule-making proceedings may not be concluded within a matter of years.

Greylock's affidavit adds that if Channel 10 comes on the air, Greylock cannot successfully operate in the area to be served. This is another way of saying that the public demands the superior entertainment and the network broadcasting to be provided by VHF. I do not

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ute . . . ." Bazelon, J., in West Texas Utilities Co. v. N.L.R.B., 87 U.S. App. D.C. 179, 181, 184 F. 2d 233, 235 (1950).

"We are in accord here with the authorities which require great weight to be given an administrator's interpretation of the statute he is directed and empowered to administer." Prettyman, J., in Union Manufacturing Co. v. N.L.R.B., 95 U.S. App. D.C. 252, 255, 221 F. 2d 532, 536 (1955), *cert. denied*, 349 U.S. 921 (1955).

[4] We unanimously denied Van Curler's motion for a stay. Van Curler went off the air voluntarily, not because of a VHF allocation to Vail Mills but because Van Curler lost its network affiliation.

[5] Although not in point here, the desire of Congress may be seen from Public Law 391, approved January 20, 1956, which amended § 309(c), the protest provision of the Act. To accompany H.R. 5614 which became Public Law 391, Senate Rep. No. 1231 explained:

"The public may be deprived unnecessarily for a prolonged period of time of new radio or television service pending the outcome of the protest hearing. The Commission is now required, except where the continuance of an existing service is concerned, to stay the effectiveness of any protested grant until it issues a final decision on the protest after a full evidentiary hearing. Even where there is a pressing need for the service in question and little or no likelihood exists that there will be any grounds shown for setting aside the grant, the Commission is given no discretion to consider whether the public interest requires the grant to remain in effect."

understand that any licensee is guaranteed freedom from competition. Indeed, § 304 of the Act provides:

> "No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Our case comes to this, Greylock, WMGT, insists that the court shall provide it with a listening audience. I have no doubt that Greylock can be heard both in the Hudson Valley proceeding and in the Commission's rule-making hearings, now under way. Moreover, it can itself apply for Channel 10. Yet because the majority here finds "irreparable injury" it would stay the Commission's hand.[6]

Greylock asks the court to stay the Commission's hand to obviate "cancellation of UHF conversion orders." Thus the court is asked to stimulate the sale of converted sets which will represent a totally unnecessary expenditure by the viewing public if and when Greylock closes down its UHF broadcasting. That is Greylock's plan. Its president swears: "It will definitely be my recommendation to the petitioner's Board of Directors that WMGT discontinue its UHF operations if and when Channel 10 is utilized at Vail Mills. I am certain that the Board will adopt my recommendations." Since he is president and principal stockholder, it is reasonable to conclude that the corporation will do exactly as he says. So, after the area is saturated with conversions, Greylock will immediately apply for Channel 10 if this court shall have refused to stay the Commission's order.

Such evidence has been submitted. In my judgment, it falls far short of creating that degree of public injury for which Greylock in its own private interest is being

[6] Cf. Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 540 (1954).

permitted to speak. "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff."[7]

I do not know what criteria will be relied upon by the Commission when it considers various proposals for "deintermixture." Moreover an ultimate disposition does not necessarily depend upon deintermixture, especially since desirable programming and live network telecasting are important facets in the public's choice. The November 10, 1955, "Notice of Proposed Rule Making" poses many of the complexities of a most difficult problem, the intricacies of which are singularly matters for Commission decision. Perhaps VHF operations on Channel 10 in this very area would have afforded the Commission data and information which would be invaluable in arriving at a correct result, whether it be a different allocation or a share-the-time form of broadcast or what not. At any rate, the solution lies singularly within the Commission's orbit, and meanwhile a needed and a wanted service should be provided. Steps to insure that it will be provided could have been taken—except for the court. I do not understand that we are the sole guardians of the "public interest."

It may well be that there should be more, not less competition. It may well be that there should be fewer UHF stations with greater power permitted to those allocated to a given area. The Commission has here specifically found that operation of Channel 10 is *in the public interest.* "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will

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[7] Yakus v. United States, 321 U.S. 414, 440 (1944); and see Scripps-Howard Radio v. Comm'n, *supra* note 1, 316 U.S. at 14, 15.

act in accordance with its statutory obligations."[8] I believe the Commission's action was dutiful and within its province.

That is why I say my differences with my colleagues are fundamental. The claim for equitable relief is being treated as though the issue involved only a controversy between two litigants, while our true concern should involve a recognition of the proper distribution made by Congress for the exercise of legal authority by the Commission on the one hand, and by the courts on the other. It seems to me appropriate to recall what the Court said in the WJR case:[9]

> "At the outset we note our complete agreement with the Court of Appeals that the Commission was under no duty to WJR to postpone final action on the Coastal Plains permit until it had disposed of the clear channel proceeding. As the court pointed out, WJR had no vested right in the 'supposititious eventualities' that the Commission at some indeterminate time might modify its rules governing clear channel stations. Furthermore, the judicial regulation of an administrative docket sought by WJR 'would require [the Court of Appeals] to direct the order in which the Commission shall consider its cases.' And this, as the court said, it 'cannot do.' 174 F. 2d at 231."

But, here the majority would do it.

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[8] Nat. Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943); cf. Commission v. Sanders Radio Station, 309 U.S. 470, 475, 476 (1940); cases cited in testimony of Commissioner Coy, *Hearings Before the Committee on Interstate and Foreign Commerce of the House on S. 658*, 82d Cong., 1st Sess., pp. 124 *et seq.* (1951).

[9] Communications Comm'n v. WJR, 337 U.S. 265, 272 (1949).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND HUDSON VALLEY BROADCASTING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., 1a–9a) has not yet been reported. The Report and Order of the Federal Communications Commission (R. 94–111)* has not been officially reported; it is unofficially reported at 13 Pike & Fischer, Radio Regulation 1511.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the Commission's order, was entered on July 9, 1956.

*"R" refers to the Joint Appendix filed in the Court of Appeals.

The petition for a writ of certiorari was filed on October 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission erred in receiving an informal submission of material relating to nationwide television allocation problems during the pendency of a rule-making proceeding looking toward the amendment of the television allocation table to add a VHF channel at Vail Mills, New York.

2. Whether the Commission acted inconsistently with *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. 327, when it adopted the proposal to add a VHF channel at Vail Mills and simultaneously rejected petitioner's proposal to delete the VHF channels in the area.

3. Whether the Court of Appeals erred in holding that the Commission's report adequately sets forth the reasons for its decision, as required by Section 4 (b) of the Administrative Procedure Act, 5 U. S. C. 1003 (b).

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and of the Communications Act of 1934, as amended, are set forth in the petition.

STATEMENT

In April 1952, the Federal Communications Commission adopted a new Table of Assignments in which television channels were assigned to communities throughout the United States. (Sixth Report and Order, Docket Nos. 8736, et al., 17 F. R. 3905.) Un-

der this table, which was included in Section 3.606 of the Commission's Rules and Regulations, 47 CFR 3.606,[1] the Albany-Schenectady-Troy area in New York State was assigned VHF channel 6 and UHF Channels 17, 23 and 41.

The use of both VHF and UHF channels in the same community is commonly called "intermixture." It was concluded in the 1952 Sixth Report and Order that the fullest opportunity for a nationwide television service making the maximum use of available spectrum space would be afforded by intermixing UHF channels with VHF channels (which are capable of providing a greater coverage) in an integrated plan. (17 F. R. 3905, at 3912–3914.)

At that time, General Electric Company was already the licensee of station WRGB on Channel 4 in Schenectady. Its license was modified to specify Channel 6, in accordance with the new allocation plan. Channel 17 was reserved for a non-commercial, educational station. Patroon Broadcasting Company subseqently received a construction permit for Channel 23, but has never commenced operation. Hudson Valley Broadcasting Company, Inc. (Hudson Valley) went into operation on Channel 41 at Albany as WROW–TV. Petitioner Van Curler Broadcasting Corporation (Van Curler) was authorized to operate on Channel 35 at Albany, as WTRI.[2]

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[1] The Commission's authority to assign television channels by rule making had been sustained in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C. A. D. C.).

[2] This channel was originally assigned at Schenectady alone, but was later assigned to Albany-Schenectady-Troy jointly (19 F. R. 2900).

On November 4, 1954, Hudson Valley filed a petition for rule making to amend Section 3.606 to assign VHF Channel 10 at Vail Mills, New York (R. 2). The Hudson Valley proposal was opposed by Van Curler (R. 4) and Greylock Broadcasting Company (R. 15), which is the permittee of UHF station WMGT-TV, Adams, Massachusetts. Van Curler also included a counter proposal of its own, *i. e.*, that VHF Channel 6 be reserved for educational use and that the General Electric station on that channel be required to move to UHF Channel 17, a channel presently reserved for educational use and one for which the University of the State of New York holds a construction permit. This was a proposal to "deintermix" the commercial channels by making all commercial channels UHF channels.

On December 17, 1954, the Commission released a Notice of Proposed Rule Making And Orders To Show Cause, in which it afforded all interested parties an opportunity to comment on the proposals before it (R. 19). This notice also directed General Electric and the educational permittee to show cause why their authorizations should not be modified as proposed by Van Curler. After the receipt of comments in response to this notice, the Commission, on April 21, 1955, released a Notice of Further Rule Making (R. 35). The notice stated that the Van Curler proposal was similar to other deintermixture proposals which had been made by other parties in then-pending proceedings concerning other communities, and that since a uniform policy was desirable if changes in the exist-

ing pattern of intermixture were to be made, the same type of information and data which had been requested in the other proceedings should also be furnished here. It therefore requested further comments directed to six specific categories of information. The parties thereupon submitted additional comments in response to this second notice. (See R. 44–80.)

On June 27 and 28, 1955, the Commission heard oral argument in this proceeding, together with argument in other pending proceedings in which deintermixture of VHF and UHF channels in other cities had been proposed (R. 80). Subsequently, Van Curler requested that the instant proceedings be reopened upon the basis of a contention that Columbia Broadcasting System, Inc. (Columbia) had made informal presentations to the Commission which allegedly affected the proceeding (R. 89).

On November 10, 1955, the Commission adopted the Report and Order here involved, three Commissioners dissenting (R. 94–111). This Report denied the various specific requests for "selective" deintermixture, because they would not provide a meaningful solution to the general problems which had been raised and which the Commission found should be considered on a nationwide basis (R. 99–103). The Commission simultaneously instituted a new general proceeding to review the whole allocation question on such a basis. (Docket No. 11532, 20 F. R. 8501.)

The Commission granted the proposal to assign Channel 10 to Vail Mills. It pointed out that this assignment did not require any departure from the

principles behind the existing plan, and that it would provide a new service to the public. The proposal was adopted in order that the wide coverage which a VHF channel could provide should not be withheld pending some possible future decision on the general allocation problems. (See R. 99, 103–104.[3]) With respect to the request to reopen the proceedings because of the material submitted by Columbia, the Commission pointed out that this material did not bear on the merits of any particular petitions then being ruled upon, save to the extent that any discussion devoted to nationwide allocation problems might do so, and that the Commission, of course, must keep in touch with such general suggestions, whether informally submitted to it or to Congress. The Commission stated that the new general rule-making proceeding which was being instituted contemporaneously would afford all parties an opportunity to propose, and comment upon, such general solutions. It concluded that there was therefore no reason to reopen

[3] The allocation of an additional VHF channel here, it may be noted, was not an isolated case. The Commission has consistently endeavored to make the fullest use of these channels, which are scarcer than UHF channels. Many VHF channels have been added to the table of assignments since 1952, especially in small communities near large centers of population. See, *e. g.*, the assignment of VHF Channel 6 at Whitefish Bay, Wisconsin, near Milwaukee (18 F. R. 8135); the assignment of VHF Channel 9 at Hatfield, Indiana, near Evansville, Indiana, and Owensboro, Kentucky (18 F. R. 5678); and the assignment of VHF Channel 10 at Parma and Onondaga, Michigan, near Jackson (19 F. R. 429).

the prior proceedings to insert comments, and possible replies, directed to nationwide plans (R. 104–105).[4]

The Court of Appeals, sitting *en banc*,[5] affirmed the Commission's order, two judges dissenting. The court held that the Commission had complied with the Administrative Procedure Act (Pet. App. 4a); that it had followed a course anticipated and provided for in the Sixth Report (Pet. App. 4a–5a); and that the report adequately stated the basis and purpose of the rule change (Pet. App. 5a). It found no error with respect to the Commission's decision on the *ex parte* submission of Columbia, observing that the Commission was merely receiving advice and information on nationwide allocation problems with respect to which a new general rule-making proceeding was being instituted (Pet. App. 5a).

ARGUMENT

Contrary to petitioner's contention, the decision of the Court of Appeals raises no novel question of administrative law. The Court of Appeals merely ap-

[4] As petitioner notes (Pet. 12, fn.), the Commission has since proposed the deletion of Channel 10 from Vail Mills. (21 F. R. 4970.)

[5] Petitioner claims that the Court of Appeals sat *en banc* because of the importance of the issues (Pet. 12). However, we think it likely that the court heard this case *en banc* principally because of its similarity to *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686 (C. A. D. C.), heard *en banc* the same week, in which several UHF stations sought review of the denial of deintermixture petitions and grants of new VHF licenses. The court stated that the cases were "closely akin" (Pet. App. 2a). Petitioner does not argue in this Court the validity of the denial of its deintermixture petition, which was the main point of similarity with the *Coastal Bend* case.

plied the established standards governing review of administrative rule making; and it correctly determined that the Commission had reached a reasonable conclusion on the record before it and had conducted the proceeding in full accord with the Administrative Procedure Act. The petition therefore presents no question calling for further review by this Court.

1. Petitioner first contends (Pet. 13–16) that it is improper in a rule-making proceeding to permit "secret intervention" by one not a formal party. But this argument misconceives the situation before the Commission. The Court of Appeals found that the Columbia Broadcasting System submissions "were in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceeding to deal with intermixture. We find nothing improper or erroneous in the Commission's consideration of these interviews as depicted in this record." (Pet. App. 5a.)

This conclusion, we submit, was correct. The Commission has a continuing responsibility to keep abreast of current problems in the industry it regulates. In the nature of things, it is constantly made aware, as it should be, of general suggestions, whether they are informally brought to its direct attention or submitted to Congress. The informal submission by Columbia of the results of its study of the national television allocation plan—a submission which added to the Commission's general store of knowledge—surely does not serve to invalidate a quasi-legislative

proceeding dealing with assignment of a specific channel.

The Court of Appeals properly found that no more was involved. For the Commission's opinion denying petitioner's request to reopen the record shows that the Commission did not consider this material in connection with the Vail Mills proceeding. The Commission made clear that it was acting upon the record before it and that general allocation proposals and discussions, like Columbia's, were being deferred to the new, general rule-making proceeding instituted that day, where they could be formally submitted (R. 104–105). It concluded in its report that no useful purpose would be served in reopening the proceeding "to insert comments, and replies thereto, whose function is to discuss nationwide plans and whose proper forum is the general rule making proceeding in which all interested parties may participate." (R. 105.)

2. Petitioner's argument (Pet. 16–17) that the Commission erroneously granted the petition of Hudson Valley to add VHF Channel 10 at Vail Mills, because it simultaneously postponed consideration of petitioner's mutually exclusive request to deintermix the area by eliminating all of the commercial VHF channels, is also based upon a misconception of what the Commission did and the governing legal principles.

The Commission did not postpone consideration of the request to deintermix; it denied it. It did so because it found that petitioner's deintermixture request, like the similar requests of other parties re-

lating to several different communities, could not be considered apart from general problems of allocation which would have to be determined on a nationwide, rather than an *ad hoc,* basis (R. 102–103). The denial of such other deintermixture requests was sustained by the Court of Appeals in *Coastal Bend Television Co.* v. *Federal Communications Commission,* 234 F. 2d 686 (C. A. D. C.).

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U. S. 327, upon which petitioner relies (Pet. 16–17), is not relevant here. This Court held in *Ashbacker* that an applicant for a license was denied his statutory right to a hearing (see Section 309 of the Communications Act, 47 U. S. C. 309) when a mutually exclusive application was granted and he was relegated to a subsequent hearing in which he would have the burden of displacing the first grantee. Here, the question was not one of choosing between competing licensees in adjudicatory proceedings.[6] The question was whether the Commission should adopt Hudson Valley's proposal for a single change of assignment under the existing allocation plan, or should adopt petitioner's proposal that there be a fundamental revision of the basic premise upon which the existing allocation table rests. The Commission refused to scrap the existing basis of al-

[6] No license grant is involved in this case. The question before the Commission was the allocation by rule making of a channel for which individuals might apply. See *American Trucking Assns.* v. *United States*, 344 U. S. 298, distinguishing rule-making and adjudicatory proceedings.

location under which it has long been operating.[7] There is no inconsistency in the fact that the Commission left petitioner free to urge deintermixture in a subsequent proceeding devoted to re-examination of the general problems of allocation. This was but a recognition that abandonment of the existing intermixed plan would raise problems which could only be met adequately in a rule-making proceeding of nationwide scope. The Commission need not cease acting under rules long since adopted and sustained by the courts in order to consider the feasibility of adopting amended rules embracing a new and fundamentally different system of allocation. On the contrary, this is a situation in which the precept that the Commission must have broad discretion to order the sequence of its business (see *Federal Communications Commission* v. *WJR, the Goodwill Station, Inc.*, 337 U. S. 265, 272) applies with particular force.

3. Finally, petitioner claims a failure on the Commission's part to comply with the requirement of Section 4 (b) of the Administrative Procedure Act, 5 U. S. C. 1003 (b), that "the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose * * *." (Pet. 17–24.) The same contention was made to the Court of Appeals, which specifically found that the purpose in assigning Channel 10 to Vail Mill was adequately stated and that the decision had a rational basis. (Pet. App. 4a–5a.) Petitioner's challenge to this hold-

[7] Petitioner, while it sought review below of the denial of its deintermixture proposal, raises no issue here as to the validity of that denial.